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# MICHIGAN LAW REVIEW

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THOMAS McINTYRE COOLEY.

IN the early fifties, there were four young men practicing at the bar of the State of Michigan who became so influential during the formative period in the jurisprudence of the state that we cannot name one of them without thinking of the others. James V. Campbell, Isaac P. Christiancy, Thomas M. Cooley and Benjamin F. Graves came from New York parentage and from New England stock. The three last named received their education in the primary schools and academies of New York. As young men seeking their future they came west and settled in different parts of this state. Mr. Campbell's parents had moved from Buffalo to Detroit when he was three years old, where he continued to reside up to the time of his death.

On Jan. 1st, 1868, these four, then comparatively young men, sat together for the first time as the Supreme Court of the State of Michigan. For a long series of years they continued together, and as the term of one after another expired he was reelected as a matter of course. Such was the confidence of the people in their judgments. Today they are frequently spoken of as "The Big Four" of our Supreme Court.<sup>1</sup> This is perhaps not so much because of their pre-eminence over others who have filled the bench, but because of the eminent fitness of each for the place. They frequently differed in their beliefs and decisions. Each was an independent reasoner of unusual power of expression. Their discussion of cases among themselves was undoubtedly candid, but must have been earnest and at times spirited. They formed a combination of checks and bal-

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<sup>1</sup> Memorials on the lives of these four men are found in the official reports of the Supreme Court of the State: on Justice Christiancy, 87 Mich. 1; on Justice Campbell, April Term, 1890; on Justice Cooley, 119 Mich. 1; on Justice Graves, 143 Mich. 1.

ances that gave to litigants an assurance that the right thing would be done.

Something of the indebtedness of the state to these men may be indicated by recalling these facts: Judge Christiancy was the first to retire from the bench; he entered the senate of the United States, in 1875, after a continuous service of 17 years as a member of the court; then Judge Graves retired, in 1884, after 16 years' service; then Judge Cooley, in 1885, after 21 years' service; and then, in 1890, Judge Campbell died while a member of the court and after a continuous service of 32 years. It is believed that no state of the Union has been more fortunate than Michigan, in its early judicial history, and that by reason of the influence of these men on her jurisprudence.

Thomas M. Cooley was born at Attica, Wyoming Co., New York, on Jan. 26th, 1824, and died at his home in Ann Arbor on Sept. 12th, 1898. His father came from Massachusetts into western New York and, near the village of Attica, took up farming. Thomas M. was one of a family of fifteen children; a farmer's boy in a new country and with limited resources and opportunities.

His father had hoped that he would take to farming, but the boy discovered a disposition to read and study. His mother encouraged him in this, but the circumstances of his parents were not such that they could help him. They could not give him the advantages of a liberal education. He was compelled to help himself; and it became the familiar story of work on the farm in the summer and in the district school through the winter, first as a pupil and then as a teacher. He was able to attend for awhile an academy in Attica, where he did some work in the classics, particularly in Latin. This experience probably disclosed to the young mind that its field of usefulness was not on the farm. A desire to study law possessed him, and at the age of eighteen, at Palmyra, New York, he entered the office of Theron K. Strong, a lawyer of learning and ability, who afterwards became a judge of the Supreme Court of that state. Those of us familiar with the personality of Judge Cooley know that this first important step in his life must have been taken deliberately and with a determination to succeed in spite of many obstacles which must have seemed insurmountable. He was without property and without friends to assist him; he did not have a commanding personal presence, nor that gift for public speaking, which too many young men mistake as a call to the bar. Against every discouragement he set his indomitable will. He loved the study of the law and would not be denied.

He had qualifications, however, of which he was quite unconscious, for he was too modest to justly estimate himself. He possessed

a severely analytical mind, strong in reasoning power, quick and clear in thought, simple but definite in expression, and a capacity for intellectual labor common to but few men. These are sometimes accomplishments acquired through years of collegiate training, but he had no such opportunity. Sometimes they come through experience and contact with the world, but in this case they were manifest at the beginning of his career. Perhaps he was not a genius, but he was certainly endowed with a master mind.

It was our good fortune, a few summers ago, to meet Mr. Cooley's teacher in the classics at the Attica academy, a gentleman of much learning and refinement, then past ninety years of age, who recalled distinctly the marked intellectuality, shown by Mr. Cooley in his school boy days.

At the age of twenty the young man, emulating the example of his father, cut loose from the environments of his early days and came west. He entered the law offices of Tiffany & Beman, at Adrian, Michigan, and was admitted to the bar in January, 1846. In December of that year he married Mary Elizabeth Horton, then sixteen years of age. They lived an ideal home life until her death in Ann Arbor, in 1890. Here they reared and educated a family of six children, four boys and two girls, now men and women well and favorably known to the citizens of this state. During the many years the family resided in Ann Arbor Mrs. Cooley took an active interest in public affairs and an active part in the social life of the city. For some twenty years the Cooley home on State street was well known for its hospitality to the citizens of Ann Arbor, and to the faculties and students of the University of Michigan. The alumni are deeply impressed by the announcement that this historic place has been recently purchased and is to become the permanent home of the Michigan Union.

The first ten years of Mr. Cooley's experience at the bar was not uncommon. He was restless, ambitious to achieve something, but could not get a foothold. During this time he formed a partnership in law with Consider A. Stacey at Tecumseh, Michigan, then, in 1848, he returned to Adrian and formed a law partnership with Beman & Beecher. He remained in Adrian until 1854. In the meantime he had held the office of circuit court commissioner, and recorder of the village, and had been editor of a weekly newspaper, the *Adrian Watchtower*. He continued his practice at the bar, such a practice as is to be found in a village in a new country. He was not content, however, and in 1854 he went to Toledo, Ohio, and engaged in the real estate business; but he soon returned to Adrian and formed a partnership with the late Governor Croswell. This

association proved a fortunate one. Mr. Croswell kept the offices, found clients, and Mr. Cooley tried the cases.<sup>2</sup> This brought him to the attention of the bench and bar. Mr. Cooley, however, was never regarded as a strong advocate on the trial of an issue of fact; his strength was before the court on an issue of law. Here it was that those near him soon observed his ability as a lawyer in the highest sense; one with capacity to interpret the law and apply it wisely to admitted facts.

In 1857, Mr. Cooley was chosen by the legislature as compiler of the laws of the State of Michigan. This gave him his first opportunity to do the kind of work for which he was naturally qualified. In this compilation he gave to our state law a scientific classification that has not been materially improved upon since. The work was finished within nine months, the time fixed by law, and met with general approval from the profession. It gave him state recognition and probably induced his appointment by the Supreme Court of the state as reporter of its decisions, a position he held for several years. In this capacity he was of great service to the courts. His syllabi are models of brevity, clearness and accuracy. The lawyer reads them with satisfaction and confidence.

The year 1858 was an eventful one in Mr. Cooley's life. He had been at the bar some twelve years practicing without any marked degree of success. He had, however, just completed his compilation of the statutes and through this and his Supreme Court reporting he was attracting the attention of men prominent in state affairs. The Regents of the University of Michigan were about to establish a department of law, and, in 1859, this was done. Mr. Cooley was elected one of the first faculty, consisting then of three members. He was the youngest in years and experience. His associates were Judge James V. Campbell and Mr. Charles I. Walker, able and accomplished lawyers of large state acquaintance. Mr. Cooley was made secretary of the faculty and at once removed to Ann Arbor where he continued to reside until the time of his death. He made this change that he might do the University work assigned to him. He was the only resident member of the faculty for many years; the other members residing in Detroit. It is not unfair to his associates to say that a large share of the work of organizing our department of law was entrusted to him. It is evident that he planned our first course of instruction along the lines adopted at Harvard, by such law teachers as Story, Greenleaf, Parsons and Washburn. The latter two were then on the faculty of that institution. The method of instruction was by lectures exclusively. The text book and case

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<sup>2</sup> Memorial Address of Charles A. Kent, in 1899.

method of recent years was then unknown to the law schools of the country. In fact there were few schools of law and most students fitted themselves for practice by study in offices. There were no students' text books in law and no case books. Lectures upon selected subjects were the only practical means of imparting instruction in law, in schools and colleges.

The law department has had an enviable reputation from the beginning, and attention has been frequently called to its good fortune in its first faculty. "The memory of that first faculty, their skill as teachers, as well as the reputation the members made on the bench and at the bar, and the wide-spread and commanding influence of Judge Cooley's books upon the growth and development of the law during the last years, have been, and still are, potent influences in turning the footsteps of the youth of every state \* \* \* towards these halls where Judge Cooley and his associates labored so faithfully and well."<sup>3</sup>

As a teacher Mr. Cooley had a manner and method of imparting instruction impressive because of its simplicity. There was nothing ornate in his expression or delivery. A legal principle was stated plainly and with such accuracy and brevity that very little exposition or illustration was needed. His ideas were never smothered in words. In his lectures he would pass rapidly from one principle to another, but in such logical sequence that when he had finished a subject the outline was easily recalled.

There was an indescribable something in his personality as a lecturer, or reader of what he had written, that impressed his ideas upon the student's mind so indelibly that not only what had been said but the precise words used were easily retained. His method of treating a subject emphasized the importance of studying law as a science, giving to each principle its proper place and observing its relation to and effect upon the others. In this he was as painstaking in preparing his lectures for students as in the writing of books for the profession.

Judge Cooley retired from the law faculty in 1884, after a continuous service of some 25 years, covering the most important period of his usefulness. During these years he was not only writing and delivering regularly lectures in the department, but was also writing many books of law now recognized as standard works, and in addition to this during a great part of the time he was hearing cases and writing opinions as a Justice of the Supreme Court of the State. For nearly twenty years he carried at the same time these three lines

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<sup>3</sup> Memorial Report of the University Senate upon the death of Judge Cooley.

of work and did enough in each one of them to have exhausted the time and energy of most any other man.

The writing of his first book undoubtedly came to Judge Cooley as an inspiration from his work as a teacher, but the choice of subject came from accident, and the publication of the book met with embarrassment. When the first faculty of the law department assigned among themselves the subjects in which each was to give instruction the two older professors, for one reason or another, declined to lecture on constitutional law and Mr. Cooley was asked to do so. This was a heavy obligation to place on a young man of limited experience in the law and with no special educational qualifications; but he accepted. It was like him to do so; he never declined a task because of the labor involved. We should remember, however, that the law of the constitutions of the several states at this time, was a complex subject and remained so until he simplified it.

After having lectured a number of years upon the subject, he presented to his associates on the bench, for review, a manuscript he had prepared. He doubted its value, but they warmly approved of it and urged its publication. He then offered it to a publisher and it was rejected, but it was soon accepted by another, and Cooley's *Constitutional Limitations* was given to the public. This was the first conspicuous product of his labors as professor of law at the University of Michigan. It was pronounced at once an exhaustive and scientific treatise on written constitutions as a limitation on legislative power. The literary excellence as well as the great learning in the law shown by the author, attracted the attention of the country not only to him but to the institution he was connected with. Whatever may be the future of the law department of the University of Michigan it will always remain famous for one thing. Its walls may be leveled to the ground; its libraries may be scattered by the winds, but time will not efface from the memory of men the fact that for 25 years Mr. Cooley taught in and from the halls of this institution not simply the few thousand students who sat at his feet, but the people of the United States, correct principles in constitutional law and constitutional government. What the names of Story and Parsons have been to Harvard, the names of Cooley and Campbell will be to the University of Michigan for many, many generations to come.

While his reputation as a law writer must rest mainly upon this, his first book, he wrote many others of great worth, now recognized as standard authorities. In 1870, appeared his edition of Blackstone's *Commentaries*; in 1874, an edition of Story's *Commentaries on the Constitution of the United States*; in 1876, a *Treatise on Tax-*

ation; in 1879, his work on Torts and, in 1880, his Principles of Constitutional Law. The latter was designed as an elementary text book for use in law schools and colleges, and it is the leading text book today on that subject.

Judge Cooley was an extensive contributor to the leading periodicals of the country, for he was a very ready, careful and thoughtful writer. He delivered also many addresses upon law and government, and upon political and economical questions. A complete list of articles and addresses by him has not been collected. A partial list was given in *THE MICHIGAN LAW JOURNAL* for December, 1896. The articles range from "The Judicial Functions of Surveyors" to "The Power to Amend the Federal Constitution." In 1881, he delivered an address before The American Bar Association at Saratoga on "The Recording Laws of the United States;" in 1885, an address before The Tennessee Bar Association on "The Duty of the Legal Profession to Make Laws Accomplish Justice;" in 1886, an address before The South Carolina Association on "The Influence of Habits of Thought Upon Our Institutions;" in 1887, an address before The Georgia Bar Association on "The Uncertainty of the Law" and in 1889, an address before The New York State Bar Association on "The Comparative Merits of Written and Prescriptive Constitutions." These are only a few of the many important public addresses delivered by him. They illustrate, however, his sweep of vision and his intellectual activity. There were few important questions of his time upon which he did not express thoughts, and whatever he wrote was eagerly read by the educated men of both hemispheres.

He also essayed with success some historical writing. His contribution to the American Commonwealths series is a highly interesting volume on "The History of Michigan." It gives the constitutional development of the state from the beginning, through the French, English, Territorial and State governments. In 1887, he read before the Indiana Historical Society an exhaustive paper on "The Acquisition of Louisiana," but Judge Cooley's most enduring fame comes from his writings in the field of jurisprudence and his labors on the bench as a member of the Supreme Court of the State of Michigan.

He took his seat as a justice of that court on January 1st, 1865, and served in that position continuously until October 1st, 1885, when he resigned, after having rendered a great and permanent good to the jurisprudence of his state. Few men of his generally recognized ability, as a jurist, have occupied the bench in the courts of last resort in this country.

A review of his writings and opinions handed down is not within

the scope of this article, but reference to a few of them may be well, as illustrative of his views on some questions and of his logical and vigorous style of writing.

It is frequently said that Judge Cooley was a strict constructionist of our national constitution. That he did not believe in violating the constitution for the sake of saving it is quite true, but, on the other hand he did not think that the nation was without power to expand through the acquisition of territory by treaty. He doubted the doctrine of Jefferson that "the constitution has made no provision for our holding foreign territory; still less for incorporating foreign nations into our union." Jefferson himself abandoned this doctrine on our acquisition of Louisiana, and in discussing that event in our history Judge Cooley gives his views of our nation's implied powers. He said: "It was not the intention in forming the constitution that the government of the union in dealing with national questions should have any less than the same complete authority which is possessed by other independent governments, or that it should be precluded under any circumstances from recognizing and acting upon such motives of necessity and of supreme policy as may be recognized and acted upon by others."<sup>4</sup>

He was not willing, however, to carry these powers to the extent of annexing by treaty or other congressional action territory not contiguous and no part of the American continent and inhabited by a people with a language and institutions unlike our own. When the annexation of Hawaii to the United States came up for discussion he wrote most vigorously against it, he contended that the nation had no implied power to annex the islands by treaty or otherwise; that there were implied limitations upon the treaty making power. He wrote: "Outlying colonies are not within the contemplation of the constitution of the United States at all. The structure of the government created under it never had in view such colonies, and the people of the United States would never have consented to provide for our holding them. Our government is not suited to that purpose." Again: "There is no indication in the constitution itself, or in any of the actions or discussions which led up to its formation, that the people of the day contemplated any other condition of things than a union composed of contiguous states made up of people mainly of one race, with territory held in common by them to be governed under congressional authority on its way, through increasing population, to the formation of other such states, and to admission to the union on an equal footing with the original states when the proper maturity had been reached.

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<sup>4</sup>"Acquisition of Louisiana," Address before Ind. Historical Soc., 1887.

This was the general plan of the union and all the terms of the constitution, when applied to it, are fully satisfied. Anything proposed under the treaty-making power that if carried into effect would change this condition of things; and especially anything that would make of the nation a ruler of outlying states or colonies or territory not acquired with any expectation of being brought into the union or not capable of becoming harmonious members of a family of contiguous states constituting together one common territory, would seem to be as much by implication forbidden as would be anything that directly antagonized the provisions of the constitution itself."<sup>5</sup>

It is easy to understand what would have been the views of Judge Cooley on many of the questions that have been troubling us during the past ten years, regarding our outlying dependencies. He would have been an anti-expansionist and possibly an anti-imperialist, but of this we are not so certain, for he was a firm believer in a strong government when control was once assumed or acquired through the exigencies of war. He recognized the law of necessity, but was slow to cast aside implied limitations in our national constitution on any ground of expediency or policy. He was not impressed with our manifest destiny as a world power. The verdict of history is not in accord with his views on the annexation of Hawaii, but it is hoped that no serious results may follow a departure from what he regarded as a fundamental idea of our national system.

In our state government, Judge Cooley was a consistent exponent of the independence of the three great departments in government. To him the state constitution was simply a limitation on the power of the legislature, and he was reluctant to admit of any implied limitations. All legislation was presumptively valid, and courts were without power to declare an act unconstitutional unless it violated some express provision of the constitution. His views on this subject were foreshadowed at the beginning of his judicial career,<sup>6</sup> and were expressed somewhat forcibly in one of the last of the many important opinions written by him.

In the *State Tax-Law Cases*<sup>7</sup> involving the constitutionality of the general tax law of 1882 he wrote:—

"We must enter upon the examination of a constitutional question like this, assuming that the legislature has been guilty of no usurpation. We are to remember also that we have no supervisory power in respect to legislation; that the law-making power is not

<sup>5</sup> *The Forum*, June, 1893.

<sup>6</sup> 14 Mich., p. 439.

<sup>7</sup> 54 Mich., p. 360.

responsible to the judiciary for the wisdom of its acts, and that however unwise or impolitic their acts may appear, they must stand as law unless the legislature has plainly overstepped its constitutional authority, or lost jurisdiction in the attempt to exercise it, by failing to observe some express constitutional direction. And the case must be clear; a mere doubt on our part of the validity of what the law-making department of the government has undertaken to enact, is no ground for annulling it. These are commonplaces in constitutional law: they have often been declared by us, and still more often by other courts. There is reason to believe, however, that the rules are more often laid down than observed. When a court declares an enactment invalid, its judgment is in general conclusive: the legislature cannot appeal against it, and the public is likely to accept what it adjudged as probably correct, and to acquiesce without questioning it. Under such circumstances it is to be feared that courts sometimes, without being conscious of the fact perhaps, proceed in the examination of questions concerning the constitutionality of legislation as if they were at liberty to consider the questions as questions of policy merely, and to dispose of them according to the view they should take of the wisdom of the legislation. There is ground for the belief that sometimes statutes have been annulled by courts on objections that purported to be grounded in the constitution, but which, if plainly stated, would resolve themselves into this: that the judges did not like the legislation. But every such case is mischievous in its tendency, for it shows that courts lay down proper rules for the government of their own conduct, and then fail to observe them. It is not less important that a court should keep carefully within its proper jurisdiction than that the legislature should observe the limits set by the constitution to its powers; for the spectacle of a court imputing usurpation to the legislature when in the very act the court itself is chargeable with a like disregard of duty, is neither wholesome nor edifying. We ought therefore, when we assert that the legislature has exceeded its powers, to be able to assign reasons for the assertion that are sound and substantial."

In concluding his observations on the validity of this law he wrote somewhat despairingly of judicial tendencies, he said: "Personally I have little care how this case shall be decided; but it seems to me that on constitutional questions the court is drifting to this position: That those statutes are constitutional which suit us, and those are void which do not. My own views of the proper distinctions between legislative and judicial authority do not permit of my concurring."<sup>8</sup>

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<sup>8</sup> 54 Mich. 360.

He was equally clear on the independence of the state executive and had no confidence in that distinction between ministerial and discretionary powers of the governor referred to by Chief Justice Marshall.<sup>9</sup> In his opinion all powers conferred on the governor under the constitution were discretionary and his action could not be reviewed by the courts. One of the strongest opinions ever written by him was handed down in the case of *Sutherland v. The Governor*.<sup>10</sup> The Legislature of the State and an Act of Congress had imposed upon the governor the duty of issuing a certificate of the construction of the Portage Lake and Lake Superior Ship Canal and Harbor, when he should be satisfied that the work had been done in conformity with the law. There was no doubt as to the completion of the work, but the power of the judiciary under the constitution to compel the governor to act in obedience to its writ of mandamus was denied. After calling attention to the division of powers among the departments of government he said: "It is true that neither of the departments can operate in all respects independently of the others, and that what are called the checks and balances of government constitute each a restraint upon the rest. The Legislature prescribes rules of action for the courts, and in many particulars may increase or diminish their jurisdiction; it also, in many cases, may prescribe rules for executive action, and impose duties upon, or take powers from the governor; while in turn the governor may veto legislative acts, and the courts may declare them void where they conflict with the constitution, notwithstanding, after having been passed by the Legislature, they have received the governor's approval. But in each of these cases the action of the department which controls, modifies, or in any manner influences that of another, is had strictly within its own sphere, and for that reason gives no occasion for conflict, controversy or jealousy. The legislature in prescribing rules for the courts, is acting within its proper province in making laws, while the courts, in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to

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<sup>9</sup> *Maybury v. Madison*, 1 Cranch 137.

<sup>10</sup> 29 Mich. 320.

correct the wrong by asserting a superior authority over that which by the constitution is its equal."<sup>11</sup>

To the contention that the duty of the governor in this case was simply ministerial and therefore the court might compel its performance, he said: "The apportionment of power, authority and duty to the governor, is either made by the people in the constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the constitution or the law, but also to assert a right to make the governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to entrust to the other departments of the government."<sup>12</sup>

Nowhere in all his writings does Judge Cooley point out more clearly the theory of the independence of the coordinate departments in government and its necessity to the safety of representative institutions.

While recognizing the almost plenary power of the legislature in the making of laws, unrestrained except by express provisions of the constitution, Judge Cooley found, however, some limitations necessarily implied in favor of organized society, existing before government in its largest sense was established. He was of New England ancestry and came west prejudiced in favor of the town meeting and of local self-government in cities and villages. He recognized the private powers and capacities of a municipality and held that these were beyond legislative dictation; that as regards property rights, and matters of exclusively local concern, the state had no power to interfere and control by compulsory legislation the action of municipal corporations.

In the City Park Cases, he said: "Whoever insists upon the right of the state to interfere and control by compulsory legislation the

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<sup>11</sup> 29 Mich. 320.

<sup>12</sup> 29 Mich. 328.

action of the local constituency in matters exclusively of local concern, should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle a law which permits the rest of the community to dictate to an individual what he shall eat or what he shall drink or what he shall wear as to show any constitutional basis for one under which the people of other parts of the state through their representatives, dictate to the city of Detroit what fountain shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish a park for the enjoyment of its citizens."<sup>13</sup>

Judge Cooley also recognized an implied limitation on legislative power in matters of taxation. In an opinion which attracted as much attention throughout the country as any written by him he held, that there was an implied limitation on the power of the legislature to authorize municipalities to raise money in aid of railroads through taxation, and that such legislative authority was unconstitutional, and bonds issued under it were void. This he contended was so in the very nature of things; that the taxing power could be used only for a public purpose and that a railroad was not such a purpose. In discussing the case of *The People v. Salem*, he said: "In the present case it appears that the object of the burden is not to raise money for a purpose of general state interest. Its object, on the contrary, is to create a debt which shall be a burden upon a small portion of the state only. On the ground of local benefit a small district of the state is to be taxed to encourage local enterprise, which it is supposed will be of such peculiar local advantage that this district rather than the state at large, or any greater or smaller portion of the state, should contribute to its construction.

The road, when constructed, is, nevertheless, to be exclusively private property, owned, controlled, and operated by a private corporation for the benefit of its own members, and to be subject to the supervision and control of the state only as other private property is, with such few exceptions as the state in granting corporate powers has stipulated for in order to secure impartiality in the management of its business and to prevent extortion. Primarily, therefore, the money, when raised, is to benefit a private corporation; to add to its funds and improve the property; and the benefit to the public is to be secondary and incidental, like that which springs from the building of a grist mill, the establishment of a factory, the opening of a public inn, or from any other private enterprise which

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<sup>13</sup> 28 Mich. 241.

accommodates a local want and tends to increase local values.”<sup>14</sup>

The courts of the country have not followed his views on this question, and municipal bonds in aid of railroads to be provided for by taxation are sustained in the courts of other states and by the Supreme Court of the United States. This decision came at a time, however, to be very helpful as a check on the reckless issue of city, village and township bonds in aid of railroads. Wild railway promotion through the power of taxation, at about this time, brought some sad experiences to the municipalities of the western states, which Michigan escaped through the force of this opinion, right or wrong.

Judge Cooley was also the defender of the individual rights of the citizen under the law; but he had little regard for rights said to belong to one in a state of nature and apart from society. To use his own words: “Many persons are accustomed to speak of natural rights as the rights which belong to a man in a state of nature, before he consents to any government and thereby makes himself a member of an organized society. By this it is implied that there is a state of nature antedating political organization, and therefore antedating law, in which every individual has rights given to him by the law of nature, which every other individual is under obligation to respect and observe. Now of this it must be said \* \* \* that the conception of such a state of nature is mere fancy, that it never did and never can exist, for the individual is never found outside of society and of the result, human law, except perhaps in wholly exceptional and anomalous cases, and therefore the supposition of such a state must be useless even as a matter of theory. It seems clear that any theory, in order to possess any possible value, must recognize whatever condition of things is universal and inevitable. \* \* \* Natural rights, therefore, may be defined as rights which are so fundamental, and so essential that they ought to be universally conceded as belonging to man as man, and universally recognized and protected by government.”

With this qualification he recognized as natural rights: The right to life, the right to liberty, the right to form the marital relation, the right to acquire property, and the right to make contracts. These, when assailed, he defended with all his power of reason, logic and expression. He insisted that they existed by implication, at least, under the written or prescriptive constitution of every free government. He was slow, however, to add to or extend these rights, sometimes called absolute, beyond their natural

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<sup>14</sup> 20 Mich. 452.

import. To his severely exacting mind a popular demand was not evidence of right. He never regarded the right to vote as anything more than a franchise, which the state might grant or withhold at will; he did not regard it as a natural right in any sense.

Judge Cooley insisted upon the highest degree of individual freedom consistent with good citizenship. Some thirty years ago he deplored the growing tendency to regulate and control private business through legislation.<sup>15</sup> To him the granting of exclusive privileges to corporations and the denying to the individual of the right to pursue the ordinary avocations of life, except as the licensee of some board or organization, were equally objectionable on constitutional grounds, and as against the best interest of society. It is easy to understand how a man, who had, of necessity, lived a life of self reliance, dependent only on individual effort, should guard jealously the rights of private property and personal liberty.

On retiring from the bench, in 1885, Judge Cooley intended to give his attention to writing on legal, political and economical subjects, but unexpected demands were made upon his time and energy. In December, 1886, Judge Gresham, of the United States Circuit Court, appointed him receiver of the Wabash Railway. This position he held until March, 1887, when he was appointed chairman of the Interstate Commerce Commission.

His selection for this new and important place of responsibility was received with pronounced favor throughout the country. He brought to it his remarkable energy and faithfulness to duty and undertook hopefully the solution of the many perplexing questions in our interstate commerce. He found, however, much to his disappointment, an administrative and quasi judicial tribunal of great apparent power, but with little efficiency under the law. This condition was very trying to a man of his disposition. It sapped his nervous energy and in a few years he retired with his health seriously impaired.

Up to within a few years of his death Judge Cooley continued to lecture at irregular intervals in the Law Department of the University, on topics in law and government of his own selection. The students in attendance during the early nineties remember how, occasionally, Judge Cooley, after having been assisted up the steps and to his chair on the rostrum, too weak to stand, would sit and, with manuscript in his trembling hand, talk an hour, in a clear and distinct but feeble voice, on some large subject in constitutional or administrative law. This he frequently did, and without further

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<sup>15</sup> "Limits to State Control of Private Business," *Princeton Rev.*, March, 1878.

compensation than that which came from his love for the student. He also gave a portion of his time to the Literary Department of the University, where for several years he delivered lectures on history and political science. He also delivered a course of lectures at Johns Hopkins University, but his last efforts in literary and educational fields were at Ann Arbor, in the shadow of the institution with which he had been identified for nearly forty years. But few of those, who have been or will be connected with the University of Michigan either as Regents or members of its faculties or as students, will fully realize the indebtedness of that institution to Judge Cooley for wise counsel at times of serious trouble. He came here during the administration of President Tappan, was here during the administrations of President Haven and Acting President Frieze, and from 1870 up to the time of his retirement in 1884, he was in close and confidential relations with President Angell. It is safe to say that few men on the campus had greater influence than he in these administrations, and, in the relations of the institution to the state, we must not forget that he was a member of the Supreme Court of the state when the constitutional status of the institution was on trial and when it was finally determined that the University was a constitutional unit of independent power and that the acts of its regents within their jurisdiction could not be reviewed by the courts. This gave to our University a stability not enjoyed by many state universities and has contributed materially to its continued growth and prosperity. Here, up to within two years of his death he continued to labor almost incessantly. As one of his associates has said: "He became possessed by the demon of work as other men are with the demon of strong drink, and perhaps this demon was as little amenable to reason and as fatal in effect as the other."<sup>16</sup> He would not rest until overtaken by disease, and disease brings no rest to the living.

As a citizen he lived the simple, temperate home life of a Christian gentleman. He taught the highest ideals in private character and was a living example of his teaching. We may conclude this subject with what President Angell has said of him:

"His private life was most simple and beautiful. He was a most affectionate and devoted husband and father, and never so happy as when the large group of children and grandchildren were all gathered under his roof; and he had the wonderful gift of making them all happy also. Simplicity, sincerity and kindness were the characteristics of his private life. He was also most generous in his

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<sup>16</sup> Memorial Address of Charles A. Kent, 1899.

treatment of those whom he could help, whether in gifts of money or of time and counsel. I used to think that he sometimes allowed himself to be imposed upon by persons who came to him for advice on all sorts of questions. All his students will bear witness to the freedom and good nature with which he gave them his time in advising them about their work. No private life could have been more sweet, and pure and beautiful than his."

JEROME C. KNOWLTON.

UNIVERSITY OF MICHIGAN.